UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TYCO INTERNATIONAL, LTD. and TYCO INTERNATIONAL (US), INC., Plaintiffs/Counterclaim Defendants, v. L. DENNIS KOZLOWSKI, Defendant/Counterclaim Plaintiff.	No. 02 Civ. 7317 (TPG) **ECF CASE**

MEMORANDUM OF LAW OF L. DENNIS KOZLOWSKI IN OPPOSITION TO THE MOTION OF TYCO INTERNATIONAL LTD. AND TYCO INTERNATIONAL (US) INC. FOR PARTIAL SUMMARY JUDGMENT

DEBEVOISE & PLIMPTON LLP
Robert N. Shwartz (rnshwartz@debevoise.com)
Jyotin Hamid (jhamid@debevoise.com)
Shannon Rose Selden (srselden@debevoise.com)
919 Third Avenue
New York, New York 10022
Telephone: 212-909-6000
Facsimile: 212-909-6836

Dated: New York, New York
April 16, 2010

Counsel to Defendant/Counterclaim Plaintiff L. Dennis Kozlowski

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT 3

I. Cross-Cutting Legal Errors: Tyco's Motion Disregards The Limits Of The Doctrine Of Collateral Estoppel And Applies The Wrong Governing Law To Most Claims. 3

A. Tyco Fails To Demonstrate That Collateral Estoppel Establishes Its Claims And Defenses As A Matter Of Law. 3

B. Tyco's Motion Should Be Denied Because Tyco Fails To Identify (And Apply) The Correct Governing Law. 7

II. Summary Judgment On Tyco's Claims Should Be Denied. 13

A. Bermuda Law Applies To, And Does Not Recognize, Tyco's "Disgorgement" Or "Faithless Servant" Claim. 13

B. Tyco Is Not Entitled To Summary Judgment On Its Fraud-Based Claims. 17

C. Tyco Is Not Entitled To Summary Judgment On Its Fiduciary-Based Claims. 24

1. The Breach of Fiduciary Duty Claims Are Limited To The Damages Already Repaid. 24

2. Tyco's Accounting Claim Should Be Dismissed As Moot. 25

3. Tyco's Contribution Claim Is Barred. 27

4. The Constructive Trust Claim Fails Because Tyco Admits It Has An Adequate Legal Remedy. 28

D. Tyco's Conversion Claim Should Be Dismissed As Moot. 28

E. Tyco's Unjust Enrichment Claim Should Be Dismissed As Duplicative. 30

III. Tyco Is Not Entitled To Summary Judgment On Mr. Kozlowski's Counterclaims. 31

A. Tyco's Fraudulent Inducement Defense Is Based On Disputed Facts And Cannot Be Established As A Matter Of Law. 31

B. None Of Tyco's Agreements With Mr. Kozlowski Is Subject To ERISA Forfeiture. 35

1. The ERA Is A Binding Contract And Is Not Subject To ERISA Forfeiture. 35

2. Mr. Kozlowski's DCP and SERP Accounts Are Not Subject To ERISA Forfeiture. 39

C. Tyco Is Not Entitled To Summary Judgment On Its Defenses To Its Payment Obligations Under the Retention Agreement. 40

CONCLUSION 43

TABLE OF AUTHORITIES

CASES

Abramson v. Dry Goods Refolding Co.,
166 N.Y.S. 771 (N.Y. App. Term 1st Dep't 1917) 16

Addax BV Geneva Branch v. Eastern of New Jersey, Inc.,
No. 05 Civ. 9139, 2007 WL 1321027 (S.D.N.Y. May 4, 2007) 26

Advanced Portfolio Tech., Inc. v. Advanced Portfolio Tech., Ltd.,
94 Civ. 5620 (JFK), 1999 U.S. Dist. LEXIS 1265 (S.D.N.Y. Feb. 8, 1999) 11, 12

Agency Assocs., Inc. v. John R. Sauer, Inc.,
No. 006708/2005, 2008 WL 5046770 (N.Y. Sup. Ct. Nov. 6, 2008) 28, 29

Am. Baptist Churches of Metro. New York v. Galloway,
271 A.D.2d 92 (N.Y. App. Div. 1st Dep't 2000) 25

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 7

Aramony v. United Way Replacement Benefit Plan,
191 F.3d 140 (2d Cir. 1999) 37, 38

Aramony v. United Way of Am.,
28 F. Supp. 2d 147, 171 (S.D.N.Y. 1998),
aff'd in part, 191 F.3d 140, 155 (2d Cir. 1999) 37, 38

Banco de Chile v. Lavanchy,
No. 05 Civ. 4658 (GBD)(KNF), 2008 U.S. Dist. LEXIS 91499
(S.D.N.Y. Nov. 6, 2008) 20

Bank of China, N.Y. Branch v. NBM LLC,
359 F.3d 171 (2d Cir. 2004) 19, 23

Banque Franco-Hellenique de Commerce Int'l et Maritime, S.A. v. Christophides,
106 F.3d 22 (2d Cir. 1997) 19

Battle Fowler v. Brignoli,
765 F. Supp. 1202 (S.D.N.Y. 1991) 41

BBS Norwalk One, Inc. v. Raccolta, Inc.,
60 F. Supp. 2d 123 (S.D.N.Y. 1999) 8, 10

Beltrone v. General Schuyler & Co.,
223 A.D.2d 938 (N.Y. App. Div. 3d Dep't 1996) 24

Bigda v. Fischbach Corp.,
898 F. Supp. 1004 (S.D.N.Y. 1995), aff'd, 101 F.3d 108 (2d Cir. 1996)....................38

Bland v. New York,
263 F. Supp. 2d 526 (E.D.N.Y. 2003) 5

Buckley v. Deloitte & Touche USA LLP,
No. 06 Civ. 3291 (SHS), 2007 WL 1491403 (S.D.N.Y. May 22, 2007)....................8

Burrell v. State Farm & Casualty Co.,
226 F. Supp. 2d 427 (S.D.N.Y. 2002)....................18

Capital Tel. Co., Inc. v. Pattersonville Tel. Co., Inc.,
56 N.Y.2d 11 (1982) 4

Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.,
56 F.3d 359 (2d Cir. 1995)....................5

City of Sterling Heights Police and Fire Ret. Sys. v. Abbey Nat'l, PLC,
423 F. Supp. 2d 348 (S.D.N.Y. 2006)....................9

Colliton v. Cravath, Swaine & Moore LLP,
No. 08 Civ 0400 (NRB), 2008 U.S. Dist. LEXIS 74388 (S.D.N.Y. Sept. 24, 2008) 42

Compudyne Corp. v. Shane,
453 F. Supp. 2d 807 (S.D.N.Y. 2006)....................23

Continental Airlines, Inc. v. Lelakis,
943 F. Supp. 300 (S.D.N.Y. 1996) 31

Daly v. Kochanowicz,
67 A.D.3d 78 (N.Y. App. Div. 2d Dep't 2009) 24

Diversified Group, Inc. v. Daugerdas,
139 F. Supp. 2d 445 (S.D.N.Y. 2001)....................30

Drenis v. Haligiannis,
452 F. Supp. 2d 418 (S.D.N.Y. 2006)....................11, 12

Edgar v. Mite Corp.,
457 U.S. 624 (1982)....................10

Elias v. Albanese,
No. 00 Civ. 2219 (JSR), 2000 U.S. Dist. LEXIS 11929 (S.D.N.Y. Aug. 21, 2000)...............28

Emich Motors Corp. v. General Motors Corp.,
340 U.S. 558 (1951)...5

Fassihi & Ors v. Item Software (UK) Ltd.,
[2004] B.C.C. 994 (appeal taken from Eng.)...15

Fed. Deposit Ins. Corp. v. Frank L. Marino Corp.,
74 A.D.2d 620 (N.Y. App. Div. 2nd Dep't 1980) 41

Fields v. Thompson Printing Co., Inc.,
363 F.3d 259 (3d Cir. 2004)...38, 39

Frontier-Kemper Constructors, Inc. v. Am. Rock Salt Co.,
224 F. Supp. 2d 520 (W.D.N.Y. 2002) 34

GFL Advantage Fund Ltd. v. Colkitt,
03 Civ. 1256 (JSM), 2003 U.S. Dist. LEXIS 10643 (S.D.N.Y. June 24, 2003)......................11

Greenberg v. Chrust,
282 F. Supp. 2d 112 (S.D.N.Y. 2003)..23

Huang v. Sy,
No. 15155/90, 2008 WL 553646 (N.Y. Sup. Ct. Feb. 28, 2008)......................................18, 30

IMG Fragrance Brands, LLC v. Houbigant, Inc.,
No. 09 Civ. 3655 (LAP), 2009 WL 5171741 (S.D.N.Y. Dec. 18, 2009) 26

In re Blumenthal,
32 A.D.3d 767 (N.Y. App. Div. 1st Dep't 2006)..41

In re BP P.L.C. Derivative Litig.,
507 F. Supp. 2d 302 (S.D.N.Y. 2007)..8

In re First Fin. Corp.,
377 F.3d 209 (2d Cir. 2004)...28

In re Tyco Int'l Ltd.,
340 F. Supp. 2d 94 (D.N.H. 2004)...9, 14, 15

Int'l Bus. Machs. Corp. v. Liberty Mut. Ins. Co.,
363 F.3d 137 (2d Cir. 2004)...13

James v. Fleet/Norstar Fin. Group Inc.,
992 F.2d 463 (2d Cir. 1993)....................35, 37

Klaxon Co. v. Stentor Elec. Mfg. Co.,
313 U.S. 487 (1941)....................8

Kramer v. Showa Denko K.K.,
929 F. Supp. 733 (S.D.N.Y. 1996) 5

Laub v. Faessel,
297 A.D.2d 28 (N.Y. App. Div. 1st Dep't 2002)....................24

Levin v. Kozlowski,
No. 602113/02, 2006 WL 3317048 (N.Y. Sup. Ct. Nov. 14, 2006),
aff'd 846 N.Y.S.2d 37 (N.Y. App. Div. 1st Dep't 2007)....................9

Manley v. Ambase Corp.,
126 F. Supp. 2d 743 (S.D.N.Y. 2001)....................23, 24

Merchants Mut. Ins. Co. v. Arzillo,
98 A.D.2d 495 (N.Y. App. Div. 2d Dep't 1984) 4

Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.,
500 F.3d 171 (2d Cir. 2007)....................19

Miles v. Wakefield Metro. Dist. Council,
[1987] 1 A.C. 539, 570 (H.L.) (appeal taken from Eng.) 15

Northbay Constr. Co., Inc. v. Banco Constr. Corp.,
38 A.D.3d 737 (N.Y. App. Div. 2d Dep't 2007) 24

Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.,
85 F. Supp. 2d 282 (S.D.N.Y. 2000)....................12

Owens v. Treder,
873 F.2d 604 (2d Cir. 1989)....................4, 5

People v. Essner,
124 Misc. 2d 830 (N.Y. Sup. Ct. 1984) 19

Phansalkar v. Anderson Weinroth & Co. L.P.,
344 F.3d 184 (2d Cir. 2003)....................14, 41

Pons v. People's Republic of China,
666 F. Supp. 2d 406 (S.D.N.Y. 2009)....................28

Sanders v. Madison Square Garden, L.P.,
No. 06 Civ. 589 (GEL), 2007 WL 1933933 (S.D.N.Y. July 2, 2007) 15

Seven Hanover Assocs., LLC v. Jones Lang Lasalle Am., Inc.,
No. 04 Civ. 4143 (PAC), 2008 WL 464337 (S.D.N.Y. Feb. 19, 2008) 14, 17

Sheer v. Israel Disc. Bank of N.Y.,
06 Civ. 4996 (PAC), 2007 U.S. Dist. Lexis 16488 37

Siemens Solar Indus. v. Atlantic Richfield Co.,
251 A.D.2d 82 (N.Y. App. Div. 1st Dep't 1998) 24

State v. Sonifer Realty Corp.,
212 A.D.2d 366 (N.Y. App. Div. 1st Dep't 1995) 18, 19

Sullivan v. Gagnier,
225 F.3d 161 (2d Cir. 2000) 3, 4

Teachers Ins. & Annuity Ass'n v. Green,
636 F. Supp. 415 (S.D.N.Y. 1986) 18

Telecom Int'l Am., Ltd. v. AT & T Corp.,
67 F. Supp. 2d 189 (S.D.N.Y. 1999) 12

United States v. Maniego,
No. 85 C 2612, 1988 WL 146552 (E.D.N.Y. Dec. 30, 1988) 8

United States v. Miller,
471 U.S. 130 (1985) 5

Walton v. Morgan Stanley & Co., Inc.,
623 F.2d 796 (2d Cir. 1980) 8

Winn v. Schafer,
499 F. Supp. 2d 390 (S.D.N.Y. 2007) 8

STATUTES

Private Securities Litigation Reform Act of 1995,
15 U.S.C. § 78u-4(f)(7)(A)(ii) 27

29 U.S.C. § 1051(2) 38

N.Y. C.P.L.R. § 1402 28

N.Y. Gen. Oblig. Law § 15-108(c) 27, 28

Defendant/Counterclaim Plaintiff L. Dennis Kozlowski respectfully submits this memorandum of law in opposition to the motion of Tyco International Ltd. and Tyco International (US), Inc. (together, "Tyco") seeking summary judgment as to liability on all claims asserted in Tyco's Amended Complaint and on Mr. Kozlowski's counterclaims against Tyco.

PRELIMINARY STATEMENT

Tyco moves for summary judgment based on a single, flawed premise: that Mr. Kozlowski's convictions in a New York criminal proceeding deprive him of all defenses to Tyco's claims in this civil action and all rights to assert contractual counterclaims. Tyco's sweeping assertion – that collateral estoppel alone warrants summary judgment – is unsustainable under well-established principals of New York law. Collateral estoppel bars re-litigation only of "***identical***" issues that were "***necessarily decided***" in the prior proceeding. It is not an automatic right to judgment, much less summary judgment. This is not the court of public opinion but a court of law, where a criminal conviction must be precisely defined, narrowly applied to subsequent claims, and does not automatically prevent the enforcement of binding contractual obligations. Instead of undertaking this intensive analysis of facts and law required to establish a preclusive effect, Tyco's motion disregards the limits of the doctrine and invites this Court to assume that the mere fact of Mr. Kozlowski's convictions warrants summary judgment in Tyco's favor on all claims and defenses. In reality, the preclusive effect of the convictions is far more limited, and leaves open to dispute critical questions of fact and dispositive issues of law sufficient to defeat Tyco's motion.

Mr. Kozlowski is already paying a steep price for his criminal convictions. As Tyco notes no fewer than five times in its brief, he is serving a lengthy prison sentence. He also has paid $98 million to Tyco as full restitution pursuant to his criminal sentence. With that payment and the restitution paid by Mr. Kozlowski's co-defendant Mark Swartz and former Tyco director Frank Walsh, Tyco has received more than $150 million in restitution – the sum total of all the money purportedly stolen. In addition, Tyco has engaged in aggressive self-help, unilaterally seizing approximately $100 million of Mr. Kozlowski's duly authorized and earned (but deferred) compensation.

To prevail on its motion for summary judgment in this civil litigation, Tyco must meet the same burden as every other litigant, and establish its right to liability on each civil claim as a matter of law and undisputed fact. Whether it has satisfied that burden must be decided not reflexively, but methodically, with each claim and counterclaim assessed independently under the proper governing law. Using that correct analysis, the handful of discrete facts that were "necessarily decided" by the criminal jury are insufficient to establish each of the elements of any of Tyco's affirmative claims or any of Tyco's defenses to Mr. Kozlowski's counterclaims. In addition, among other errors, Tyco's brief fails to identify (and apply) the correct governing law for most of its claims, overlooks contractual and statutory bars to several of its claims and ignores factual disputes on several material issues. Ultimately, because Tyco relies almost exclusively on the criminal convictions and does not otherwise attempt to show the absence of disputed issues of material fact on each of its claims and defenses, Tyco fails to establish that it is entitled to summary judgment.

ARGUMENT

I. Cross-Cutting Legal Errors: Tyco's Motion Disregards The Limits Of The Doctrine Of Collateral Estoppel And Applies The Wrong Governing Law To Most Claims.

Two fundamental legal errors underlie Tyco's entire motion: (A) Tyco's motion disregards the limits of the doctrine of collateral estoppel; and (B) Tyco applies the wrong substantive law to the majority of its claims.

A. Tyco Fails To Demonstrate That Collateral Estoppel Establishes Its Claims And Defenses As A Matter Of Law.

Tyco's motion, despite being premised almost entirely on the doctrine of collateral estoppel, fails to state correctly the legal requirements for application of that doctrine. Tyco's motion proceeds from the erroneous legal propositions that a criminal defendant is collaterally estopped from denying in a subsequent civil action "all facts material and underlying" a criminal conviction and that collateral estoppel applies when a criminal conviction and a subsequent civil action "pertain to the same issue." See Memorandum of Law in Support of Plaintiffs Tyco International Ltd.'s and Tyco International (US) Inc.'s Motion for Partial Summary Judgment on Liability and Defendants' Counterclaims, dated March 5, 2010 ("Tyco Br.") at 12. These formulations are not supported by the cases Tyco cites, and they misstate the actual requirements for applying collateral estoppel, which, as detailed in this Section, are more rigorous and exacting.

Under the correct legal analysis, Mr. Kozlowski's criminal convictions have only limited collateral estoppel effect in this civil case. Because the criminal convictions were a judgment of the State of New York, the law of New York governs the scope of collateral estoppel. Sullivan

v. Gagnier, 225 F.3d 161, 166 (2d Cir. 2000) ("[A] federal court must apply the rules of collateral estoppel of the state in which the prior judgment was rendered.") (citation omitted).

New York law provides that a prior judgment bars re-litigation on a particular issue in a subsequent action only when "(1) the issue as to which preclusion is sought is ***identical*** to the issue decided in the prior proceeding [and] (2) the issue was ***necessarily decided*** in the prior proceeding." Owens v. Treder, 873 F.2d 604, 607 (2d Cir. 1989) (emphasis added). As the Second Circuit has held, determining the scope of collateral estoppel "depends on the specific facts and circumstances of each case" and "requires a detailed examination of the record in the prior state criminal case, including the pleadings, the evidence submitted and the jury instructions." Sullivan, 225 F.3d at 166. The proponent of collateral estoppel – Tyco, in this case – bears the burden of establishing that the issues on which preclusion is sought are "identical" to issues in the prior criminal case, and that those issues were "necessarily decided" by the criminal jury. Merchants Mut. Ins. Co. v. Arzillo, 98 A.D.2d 495, 503 (N.Y. App. Div. 2d Dep't 1984).

Whether issues are "identical," depends "not upon how . . . the parties characterize them, but on what facts are determinative of each proceeding in light of the substantive law principles . . . governing each." Capital Tel. Co., Inc. v. Pattersonville Tel. Co., Inc., 56 N.Y.2d 11, 19 (1982). Thus, if a claim in a subsequent action includes an element that is not an element of the claim as to which judgment was rendered in a prior action, collateral estoppel will not bar litigation of that element in the subsequent action. Id. at 19 (holding that overlapping issues were not identical because "in each there is an element not present in the other").

Only issues that were "essential to the judgment" are deemed to have been necessarily "decided" in the prior proceeding. Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A., 56 F.3d 359, 368 (2d Cir. 1995); Owens, 873 F.2d at 607 ("the issue sought to be precluded must have been essential to the judgment and necessarily determined in the first action"). Allegations that were presented to the jury in the prior action but were "not essential to the [jury's] determination" are not binding in a subsequent action. Bland v. New York, 263 F. Supp. 2d 526, 551 (E.D.N.Y. 2003). For example, a criminal indictment can allege a far broader range of conduct than a conviction requires. United States v. Miller, 471 U.S. 130, 136 (1985). Only those facts in the indictment which the jury "necessarily decided" – not all facts alleged in the indictment and not facts which ***might*** have been decided – have collateral estoppel effect. See Kramer v. Showa Denko K.K., 929 F. Supp. 733, 750 (S.D.N.Y. 1996) ("[C]ourts bar the use of offensive collateral estoppel where there is any ambiguity regarding which issues actually were decided in the prior proceeding."); see also Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951) (estoppel effect limited because general verdict without special findings did not indicate which means charged in indictment were found by jury).

Applying these principles to Mr. Kozlowski's criminal convictions, only a handful of discrete facts were "necessarily decided" by the jury:

- ***The Larceny Counts.*** With respect to the twelve larceny counts, the jury necessarily decided only that Mr. Kozlowski, with the intent to deprive Tyco of property and without Tyco's consent, (i) took bonuses on four occasions between August 1999 and November 2001 for himself and Tyco's Chief Financial Officer Mark Swartz (the KELP balance reduction, ADT, TyCom IPO and FLAG bonuses), (ii) paid a fee to board member Frank Walsh in July 2001, and (iii) took three disbursements to purchase artwork in the Summer of 2001. Statement of Additional Material Facts in Dispute Submitted by Defendant/Counterclaim Plaintiff L. Dennis Kozlowski, dated April 16, 2010 ("SDF") ¶¶ 12-14.

- ***The Business Record Counts.*** With respect to the eight business record counts, the jury necessarily decided only that Mr. Kozlowski, with the intent to defraud Tyco, made a false entry on (i) a document concerning a relocation loan program and (ii) seven Director and Officer Questionnaires. SDF ¶¶ 53-55.

- ***The Conspiracy Count.*** In convicting Mr. Kozlowski on the conspiracy count, the jury did not necessarily decide ***any*** facts in addition to those decided on the larceny and business record counts. Although the indictment alleged 66 overt acts, the jury was instructed that to convict it had to find that Mr. Kozlowski had committed only one alleged overt act in furtherance of the conspiracy. Because there is no way to determine which of the alleged overt act(s) the jury found Mr. Kozlowski committed and because some of the alleged acts overlapped with the larceny and business record counts, the jury did not "necessarily determine" any additional facts. SDF ¶¶ 74-79.

- ***The Martin Act Count.*** The same is true of the Martin Act count. Although the indictment alleged a number of misrepresentations and concealments underlying the Martin Act charge, the trial court instructed the jury that "the People need not prove every allegation contained in [the indictment]" but rather must prove only "a pattern of behavior consisting of more than isolated and unrelated acts." Because there is no way to determine which specific alleged acts supported the jury's verdict on the Martin Act count and because some of the alleged acts overlapped with allegations underlying the business record counts, the jury did not "necessarily determine" any additional facts. SDF ¶¶ 80-83.

Tyco's motion disregards the limits of the doctrine of collateral estoppel described above. Instead of focusing on the handful of discrete facts that were "necessarily decided" by the criminal jury, Tyco relies primarily on the far broader allegations of the ***indictment***. The indictment far exceeds what the jury was required to find to support the guilty verdict and is not a sufficient basis to preclude litigation. Tyco's sweeping argument that the criminal judgment establishes on summary judgment "a pattern of non-disclosure, concealment and obstruction" over a seven and a half year period from January 1995 through June 2002 is unsupportable. See Tyco Br. at 13. Tyco has not even attempted to meet its burden of showing that each of the elements of each of its civil claims is "identical" to an issue that was "necessarily decided" by the criminal jury.

As detailed in Sections II and III below, under the correct legal analysis, the handful of discrete facts necessarily decided by the criminal jury are insufficient to establish each of the elements of any of Tyco's claims or any of Tyco's defenses to Mr. Kozlowski's counterclaims. Because Tyco relies almost exclusively on the criminal convictions and does not otherwise attempt to show the absence of disputed issues of material fact on each of its claims and defenses, Tyco fails to establish that it is entitled to summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986) (summary judgment movant bears the burden of showing that there is no genuine issue as to any material fact).

B. Tyco's Motion Should Be Denied Because Tyco Fails To Identify (And Apply) The Correct Governing Law.

Tyco contends erroneously that all of its claims are governed by New York law. See Tyco Br. 9-12. As detailed in this Section, under the correct choice-of-law analysis, most of Tyco's claims are governed by Bermuda, not New York, law.

Tyco's failure to identify (and then apply) the correct governing law is a stand-alone basis for denying Tyco's motion for summary judgment. To prevail on a motion for summary judgment, a movant must establish its right to judgment under not just any law, but under the ***governing*** law. Anderson, 477 U.S. at 248 ("the substantive law will identify which facts are material" and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law" will determine the appropriateness of summary judgment). By basing its motion on arguments under the wrong governing law – the law of New York – Tyco has failed to meet its burden of demonstrating its right to relief under governing law. Although a court retains the power to identify and apply the correct law when the movant fails to do so, where, as here, the governing law is foreign, and therefore not easily ascertained by the court, summary judgment should be denied. See, e.g., United States v. Maniego, No. 85 C 2612, 1988 WL 146552, at *5 (E.D.N.Y. Dec. 30, 1988) (denying plaintiff's motion for summary judgment for failure to provide guidance on standards under the governing foreign law).

In a diversity case, a federal court applies the choice-of-law rules of the forum state – New York in this case. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). Under New York choice-of-law rules, claims related to corporate affairs and fiduciary duties owed to a corporation are governed by the "internal affairs" doctrine. See, e.g., In re BP P.L.C. Derivative Litig., 507 F. Supp. 2d 302, 307 (S.D.N.Y. 2007).

The internal affairs doctrine provides that claims arising from alleged breaches of fiduciary duty by a corporate officer or director are governed by the law of the state of incorporation – Bermuda in this case. See, e.g., Walton v. Morgan Stanley & Co., Inc., 623 F.2d 796, 798 n.3 (2d Cir. 1980) ("New York law dictates that the law of the state of incorporation governs an allegation of breach of fiduciary duty owed to a corporation.") (citation omitted); Buckley v. Deloitte & Touche USA LLP, No. 06 Civ. 3291 (SHS), 2007 WL 1491403, at *13 (S.D.N.Y. May 22, 2007) (under the internal affairs doctrine a claim involving a "breach of fiduciary duty owed to a corporation is governed by the law of the state of incorporation"); BBS Norwalk One, Inc. v. Raccolta, Inc., 60 F. Supp. 2d 123, 129 (S.D.N.Y. 1999) ("Consistent with the internal affairs doctrine, a claim of breach of fiduciary duty owed to a corporation is governed by the law of the state of incorporation.") (citation omitted); Winn v. Schafer, 499 F.

Supp. 2d 390, 393 (S.D.N.Y. 2007) (same); City of Sterling Heights Police and Fire Ret. Sys. v. Abbey Nat'l, PLC, 423 F. Supp. 2d 348, 363-64 (S.D.N.Y. 2006) (same). The "internal affairs" doctrine serves important public policies by providing certainty about the fiduciary standards to which a corporate officer will be held and by avoiding the possibility that an officer could be held to have conflicting duties if various states seek to apply their different standards.

Tyco itself has argued successfully on more than one occasion that, pursuant to the internal affairs doctrine, Bermuda law should apply to actions in which shareholders sought to pursue Tyco's breach of fiduciary duty and related fiduciary-based claims against Mr. Kozlowski as derivative claims based on the same allegations advanced by Tyco in this case. See In re Tyco Int'l Ltd., 340 F. Supp. 2d 94, 96 n.2 (D.N.H. 2004); Levin v. Kozlowski, No. 602113/02, 2006 WL 3317048, at *3 (N.Y. Sup. Ct. Nov. 14, 2006), aff'd 846 N.Y.S.2d 37 (N.Y. App. Div. 1st Dep't 2007). In Levin, Tyco argued successfully that Bermuda – and ***specifically not New York*** – law should apply to breach of fiduciary duty and other fiduciary-based claims against Mr. Kozlowski. Levin, 2006 WL 3317048, at *3.

Seven of Tyco's twelve causes of action arise from the fiduciary relationship between Tyco and Mr. Kozlowski. According to Tyco:

- Claims I, II and III, for breach of fiduciary duty, inducement to breach fiduciary duty, and conspiracy to breach fiduciary duty, all explicitly turn on the existence of the duty. Tyco Br. at 14-19.

- Constructive fraud, Claim V, is based on the contention that "[b]ecause Kozlowski was a fiduciary to Tyco," and "committed fraud against Tyco while in that fiduciary relationship," summary judgment is warranted, since "a requirement that the plaintiff prove the existence of a fiduciary or confidential relationship," replaces the element of scienter. Tyco Br. at 22.

- Accounting, Claim VI, "is premised on the existence of a confidential or fiduciary relationship," and "Tyco seeks an accounting in connection with Kozlowski's breach of fiduciary duty." Tyco Br. at 16.

- Constructive trust, Claim VII, requires a plaintiff to "show . . . a confidential or fiduciary relationship," Tyco Br. at 22, and is based on the contention that "Kozlowski was an intentionally disloyal fiduciary" and "in a fiduciary and confidential relationship with Tyco." Tyco Br. at 23.

- Contribution, Claim XII, "lies where the wrongdoer breaches a duty of care." Tyco Br. at 28.

Each of these seven claims contains as essential elements the existence of a fiduciary duty to the Company and its breach. Thus, each of these claims falls within the internal affairs doctrine and is governed by the place of incorporation (Bermuda). Edgar v. Mite Corp., 457 U.S. 624, 645 (1982) (claims that depend on a fiduciary duty involve "matters peculiar to the relationships among or between the corporation and its current officers" and are therefore governed by the internal affairs doctrine).

In a footnote, unsupported by any citation to New York law, Tyco urges this Court to reject the internal affairs doctrine. Tyco Br. 11 n.1. Relying solely on the Restatement of Law, Tyco argues that the internal affairs doctrine applies only to "matters of organic structure or internal administration." Id. That is not a correct statement of New York law. Tyco does not acknowledge, and cannot distinguish, the numerous New York cases holding that claims arising from the fiduciary relationship between a corporation and its officers – including claims like Tyco's, based on alleged misappropriation of corporate assets by a corporate officer – fall within the internal affairs doctrine and are thus governed by the law of the state of incorporation. See, e.g., BBS Norwalk One, 60 F. Supp. 2d at 129.

The cases on which Tyco relies in support of its argument that an interest analysis should apply are inapposite because they do not involve claims for breach of fiduciary duty. See Drenis v. Haligiannis, 452 F. Supp. 2d 418, 427 (S.D.N.Y. 2006) (applying the interest analysis to plaintiffs' fraudulent conveyance claim; no claim for breach of fiduciary duty at issue); GFL Advantage Fund Ltd. v. Colkitt, 03 Civ. 1256 (JSM), 2003 U.S. Dist. LEXIS 10643, at *8 (S.D.N.Y. June 24, 2003) (no claim for breach of fiduciary duty asserted); Advanced Portfolio Tech., Inc. v. Advanced Portfolio Tech., Ltd., 94 Civ. 5620 (JFK), 1999 U.S. Dist. LEXIS 1265, at *16-17 (S.D.N.Y. Feb. 8, 1999) (same).

Even if this Court were to disregard the internal affairs doctrine and apply the interest analysis advocated by Tyco, Bermuda law still would apply. The facts set forth in Mr. Kozlowski's Rule 56.1(a) Statement, dated March 5, 2010, and Statement of Additional Material Facts in Dispute, dated April 16, 2010, establish that Bermuda, not New York, has the greatest interest in this dispute. From 1997 through 2009, Tyco was a Bermuda company, organized and governed under Bermuda law. Statement of Material Facts Not in Dispute Submitted Pursuant to Local Rule 56.1 by Defendant/Counterclaim Plaintiff L. Dennis Kozlowski in Support of his Motion for Partial Summary Judgment, dated March 5, 2010 ("Kozlowski SUF") ¶ 2. Tyco's Bye-Laws and all of its internal corporate affairs similarly were governed by Bermuda law. Id. ¶¶ 2, 2(a). Tyco had its principal place of business in Bermuda, id. ¶ 2(a), and its Board regularly met in Bermuda. Id. ¶ 2(b). Tyco does not contend – nor could it – that it has ever been a New York corporation or has ever had its principal place of business in New York. SDF ¶¶ 2, 4-5, 8-9.

As Tyco notes, for conduct regulating torts, such as those alleged by Tyco here, the law of the place where the injury was inflicted will generally apply under the interest analysis. See Tyco Br. 10. But Tyco fails to note that, under the interest analysis, the place where the "injury is deemed to have occurred" is almost always "where the plaintiff is located." See, e.g., Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd., 85 F. Supp. 2d 282, 292 (S.D.N.Y. 2000); Telecom Int'l Am., Ltd. v. AT & T Corp., 67 F. Supp. 2d 189, 207 n.16 (S.D.N.Y. 1999). Even the cases on which Tyco relies, for example, apply the law of the jurisdiction in which the plaintiff was domiciled. See, Drenis, 452 F. Supp. 2d at 427; Advanced Portfolio Techs., Inc., 1999 U.S. Dist. LEXIS 1265, at *17. Each emphasized that New York has an "especially strong" interest in applying its law when one of its domiciliaries alleges that it has been defrauded. See, e.g., Advanced Portfolio Techs., Inc., 1999 U.S. Dist. LEXIS 1265, at * 17 (internal quotation marks and citation omitted).

Unlike the plaintiffs in the cases on which it relies, Tyco is not a domiciliary of New York. Nor has Tyco offered evidence to establish that ***any*** alleged injury or ***any*** of the alleged conduct occurred primarily in New York. Tyco Br. at 11. Although Tyco notes that it had "an office" in New York, it cannot dispute that its "principal place of business" was in Bermuda and its corporate headquarters were located in New Hampshire, Florida and Bermuda. SDF ¶¶ 2, 4-5, 8. Although Tyco notes that Mr. Kozlowski had use of a corporate-owned apartment in New York, Tyco cannot dispute that, according to Tyco's own tax filings as Mr. Kozlowski's employer, he was a resident of New Hampshire and then Florida, but never of New York. SDF ¶¶ 3, 6-7.

Tyco tries to make much of the fact that Mr. Kozlowski was prosecuted in New York. See Tyco Br. at 11. But that fact has no bearing on whether New York law governs Tyco's civil claims against Mr. Kozlowski. Using the location of the criminal trial to establish the applicable law on these civil claims makes the basic error of equating ***jurisdiction*** with ***choice of law***. As the jury in Mr. Kozlowski's criminal case was charged, the existence of a single communication with a person in New York was sufficient to vest New York with criminal jurisdiction. Response to the Statement of Undisputed Facts of Plaintiffs/Counterclaim Defendants Tyco International Ltd. and Tyco International (US) Inc Submitted by Defendant/Counterclaim Plaintiff L. Dennis Kozlowski ("56.1 Response") ¶ 17. A court's jurisdiction over a party does not determine the law to be applied – rather, if multiple jurisdictions are implicated and their laws conflict, choice-of-law rules determine which law must apply to the claims at issue. Int'l Bus. Machs. Corp. v. Liberty Mut. Ins. Co., 363 F.3d 137, 143 (2d Cir. 2004).

II. Summary Judgment On Tyco's Claims Should Be Denied.

A. Bermuda Law Applies To, And Does Not Recognize, Tyco's "Disgorgement" Or "Faithless Servant" Claim.

The most significant claim upon which Tyco seeks summary judgment was not pleaded in the Complaint. Specifically, Tyco claims that it is entitled to a judgment under New York law that Mr. Kozlowski must disgorge ***all*** compensation he earned at Tyco from January 1995 through June 2002 – $505 million in Tyco's estimation. Tyco Br. at 1, 6, 9, 29-31. Tyco asserts that this unpleaded "disgorgement" claim under New York law arises from Tyco's equitable claims, including constructive trust and accounting. Id. at 6. Tyco's brief cites no case to support the "disgorgement" claim. In resisting Mr. Kozlowski's counterclaims for benefits (and in other contexts), however, Tyco has asserted the position that its purported right to "disgorgement" arises under the New York "faithless servant" doctrine. See Declaration of Shannon Rose Selden in Support of the Motion for Partial Summary Judgment of Defendant/Counterclaim Plaintiff L. Dennis Kozlowski, dated March 5, 2010 ("Selden Decl."), Ex. 36 at 2-3, Ex. 41 at 2-3.

Whether characterized as a "disgorgement" claim based on "disloyalty" or as a "faithless servant" claim, Tyco's unpleaded claim should properly be governed by the law of Bermuda (not New York, as Tyco contends) because it arises from Mr. Kozlowski's fiduciary duty. To the extent Tyco's claim arises from its equitable claims, such as constructive trust and accounting, as Tyco contends, those claims also are based on Mr. Kozlowski's fiduciary status and, as detailed in Section I.B above, are governed by Bermuda law. Likewise, the "faithless servant" doctrine is a concept of New York fiduciary law. See, e.g., Phansalkar v. Anderson Weinroth & Co. L.P., 344 F.3d 184, 200 (2d Cir. 2003) (doctrine applies to "[o]ne who owes a duty of fidelity to a principal and who is faithless in the performance of his services") (internal quotation marks and citation omitted); see also Seven Hanover Assocs., LLC v. Jones Lang Lasalle Am., Inc., No. 04 Civ. 4143 (PAC), 2008 WL 464337, at *5 (S.D.N.Y. Feb. 19, 2008) (a "'faithless servant' claim . . . requires the existence of a fiduciary duty").

Tyco's claim, however, is not recognized under Bermuda law. Bermuda law does not recognize the "faithless servant" doctrine. See Selden Decl., Ex. 2, Froomkin March 3, 2010 Decl. at ¶ 5C. Nor does the doctrine have any equivalent under the law of Bermuda. Id. Moreover, it "is not, and has no equivalent under, the British common law, to which Bermuda courts look for guidance in the absence of specific Bermuda authority." Id.; see also In re Tyco

Int'l Ltd., 340 F. Supp. 2d at 96 (noting that where Bermuda law is undeveloped, the court should follow the practice of Bermuda courts and look to British common law for guidance). The remedy for a breach of fiduciary duty under Bermuda law follows the long-settled British common law and is limited to compensation for the loss caused by the breach. See Selden Decl., Ex. 2, Froomkin March 3, 2010 Decl. at ¶ 5B-C, Ex. 3 ¶ 6. Indeed, in Fassihi & Ors v. Item Software (UK) Ltd., [2004] B.C.C. 994 (appeal taken from Eng.), the English Court of Appeals explicitly rejected the argument that a company director should disgorge his compensation as a remedy for engaging in misconduct – the same remedy that Tyco seeks here – and held that the director could owe damages only to the extent of the loss resulting from the misconduct. See Selden Decl., Ex. 3, Froomkin October 7, 2008 Decl. at ¶ 7. Justice Holman rendered the opinion of the Court and, after exhaustively reviewing English and other relevant Commonwealth authorities on the topic, concluded:

> In my view, even in the case of dismissal for misconduct, it is not right that the employee should be deprived of remuneration for work actually done; although he may be liable to his employer for damages flowing from his misconduct.

Id. (quoting Fassihi & Ors, [2004] B.C.C. 994); see also Miles v. Wakefield Metro. Dist. Council, [1987] 1 A.C. 539, 570 (H.L.) (appeal taken from Eng.) (per Lord Oliver, "[a]n employee, for instance, who is rightly dismissed from his employment can recover salary which has become due and payable at the date of his dismissal") (citing Boston Deep Sea Fishing & Icing Co. Ltd. v. Ansell, (1888) 39 Ch.D. 339 (A.C.)). As these authorities demonstrate, under the governing law of Bermuda forfeiture or disgorgement of earned compensation is not a remedy for misconduct by an employee.

Even if the New York "faithless servant" doctrine applied to this case (which it does not), Tyco would still not be entitled to the judgment it seeks. Under New York law, "[t]o show a violation of the faithless servant doctrine, an employer must show (1) that the employee's disloyal activity was related to the performance of his duties and (2) that the disloyalty permeated the employee's service in its most material and substantial part." Sanders v. Madison Square Garden, L.P., No. 06 Civ. 589 (GEL), 2007 WL 1933933, at *3 (S.D.N.Y. July 2, 2007) (internal quotation marks and citation omitted).

Even if the New York "faithless servant" doctrine applied, Tyco has not met its burden as a movant for summary judgment because it has failed to show as a matter of undisputed fact – as opposed to a conclusory assertion – that Mr. Kozlowski's performance as CEO from January 1995 through June 2002 was "permeate[d] . . . in its most material and substantial part" by misconduct. See Abramson v. Dry Goods Refolding Co., 166 N.Y.S. 771, 773 (N.Y. App. Term 1st Dep't 1917). Tyco does not even try to show the absence of a fact dispute on this question, but instead relies solely on the criminal convictions. See Tyco Br. at 1, 6, 9, 29-31. Tyco's reliance on collateral estoppel is misplaced. Whether or not Mr. Kozlowski's performance in the relevant period was permeated in its most material and substantial part by misconduct is not "identical" to any issue "necessarily decided" by the criminal jury. See, supra, Section I.A. Indeed, Tyco could not seriously contend that the criminal convictions demonstrate that Mr. Kozlowski's stewardship of the Company was permeated in its most material and substantial part by misconduct. For nearly eight years of litigation in the MDL proceedings, Tyco has argued that the alleged incidents of "looting" were "isolated events." Tyco has acknowledged that the Company and its shareholders enjoyed one of the most dramatically successful periods of growth and creation of shareholder value in the history of corporate America. Tyco cannot deny that its extraordinary success arose during Mr. Kozlowski's tenure as CEO and has endured after him. See Memorandum of Law of Defendant/Counterclaim Plaintiff L. Dennis Kozlowski in Support of His Motion for Partial Summary Judgment, dated March 5, 2010 ("Kozlowski Moving Br.") at 5.

Mr. Kozlowski was at the helm during that period of undisputed success and, whatever his faults, even New York law would hold that he should not be stripped of all compensation earned for his service. As Judge Crotty recently held, applying the New York "faithless servant" doctrine to require complete forfeiture of compensation for a multi-year period:

> would result in a totally unjustified windfall for the Plaintiffs. . . . Essentially, Defendant would have provided six years of business services (each year of which Plaintiffs met their business goals, and each year of which was profitable for Plaintiffs) for free. Nothing in the allegations of the Complaint or in the applicable law could justify this result.

Seven Hanover Assocs., LLC , 2008 WL 464337, at *5. Tyco's unpleaded claim, which is not even recognized under the governing Bermuda law, would result in a wholly unjustified windfall. Summary judgment for Tyco should therefore be denied.

B. Tyco Is Not Entitled To Summary Judgment On Its Fraud-Based Claims.

Tyco seeks summary judgment on its claims for fraud (Claim IV) and constructive fraud (Claim V). See Tyco Br. at 20-22. Tyco relies solely on the criminal case, arguing that Mr. Kozlowski's criminal convictions on eight business record counts and the Martin Act count "conclusively establish" liability on the civil fraud claims. Id. Tyco also relies on New York law, when Bermuda law applies and does not recognize a cause of action for constructive fraud, precluding that claim altogether. Declaration of Shannon Rose Selden in Support of the Opposition of L. Dennis Kozlowski to the Motion by Tyco International Ltd. and Tyco International (US) Inc. for Partial Summary Judgment, dated April 16, 2010 ("Selden Opp. Decl."), Ex. 1, Froomkin April 8, 2010 Decl. at ¶ 3(ii).

Mr. Kozlowski's convictions on the business record and Martin Act counts do not establish each of the elements of Tyco's fraud-based civil claims. Civil claims for fraud include reliance as a requisite element, under either New York or Bermuda law, as does the New York claim for constructive fraud. Burrell v. State Farm & Casualty Co., 226 F. Supp. 2d 427, 438 (S.D.N.Y. 2002); Selden Opp. Decl., Ex. 1, Froomkin April 8, 2010 Decl. at ¶ 3(i). Civil fraud claims also include "proximate cause" as a requisite element for fraud under either New York or Bermuda law. See Teachers Ins. & Annuity Ass'n v. Green, 636 F. Supp. 415, 418 (S.D.N.Y. 1986) (quoting Zeller v. Bogue, 476 F.2d 795, 803 (2d Cir. 1973)) ("It is well settled that consequential damages for an action in tort are recoverable where they are proximately caused by the tortious conduct or where there is a 'causal nexus with a good deal of certainty' between the defendant's conduct and the damages."); Huang v. Sy, No. 15155/90, 2008 WL 553646, at *11 (N.Y. Sup. Ct. Feb. 28, 2008) ("[T]here may be recovery of other consequential damages proximately caused by the fraud provided that they naturally flow from the fraud.") (internal citation omitted); Selden Opp. Decl., Ex. 1, Froomkin April 8, 2010 Decl. at ¶ 3(i).

Neither reliance nor proximately caused harm, however, were elements of the business record or Martin Act counts on which Mr. Kozlowski was convicted. SDF ¶¶ 54-55, 80-81; see also State v. Sonifer Realty Corp., 212 A.D.2d 366, 367 (N.Y. App. Div. 1st Dep't 1995) ("the fraudulent practices targeted by [the Martin Act] need not constitute fraud in the classic common law sense, and reliance need not be shown in order for the Attorney General to obtain relief"); People v. Essner, 124 Misc. 2d 830, 834 (N.Y. Sup. Ct. 1984) ("[T]he Martin Act count, does not contain the element of reliance."). Accordingly, the criminal jury did not "necessarily determine" that Tyco relied on any of the misstatements underlying the business record and Martin Act counts or that Mr. Kozlowski's conduct on those counts proximately caused any harm to Tyco.

Putting aside the criminal convictions – which do not establish these requisite elements – Tyco does not otherwise even attempt to show the absence of a genuine fact dispute. Nor could it. Tyco's own submissions in the MDL proceedings vigorously argued that Mr. Kozlowski's conduct did ***not*** cause the consequential damages it now seeks from Mr. Kozlowski. SDF ¶¶ 107-114. Moreover, the factual record supports a finding that Tyco could not have relied upon any alleged misrepresentations by Mr. Kozlowski because Tyco knew of the alleged fraud.

"[A] party cannot demonstrate justifiable reliance on representations it knew were false." Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc., 500 F.3d 171, 182 (2d Cir. 2007) (citation omitted); see also Banque Franco-Hellenique de Commerce Int'l et Maritime, S.A. v. Christophides, 106 F.3d 22, 26-27 (2d Cir. 1997). Corporate entities act only through their officers and employees, and a corporation, therefore, "cannot rely on misrepresentations unless its agents or employees rely on those misrepresentations." Bank of China, N.Y. Branch v. NBM LLC, 359 F.3d 171, 179 (2d Cir. 2004). Where a corporation's officers and employees are aware of the alleged fraud, their knowledge is imputed to the corporation. As the Second Circuit put it, "if the [company's] officers were aware of, and participated in the defendants' allegedly fraudulent activities, then neither they, ***nor the [company]*** relied on the purported

misrepresentations." Id. at 179 (emphasis in original); see also Banco de Chile v. Lavanchy, No. 05 Civ. 4658 (GBD)(KNF), 2008 U.S. Dist. LEXIS 91499, at *23 (S.D.N.Y. Nov. 6, 2008) (corporation precluded from establishing reasonable reliance when general manager participated in scheme).

There are voluminous facts in the record which would support a finding that, apart from Mr. Kozlowski and Mr. Swartz, many Tyco officers, employees and agents knew about and facilitated the conduct underlying the business record and Martin Act counts. For example, the seven Director and Officer Questionnaires, which the criminal jury found to contain misrepresentations, were purportedly false because they allegedly misstated facts about Mr. Kozlowski's borrowing under Tyco's Key Employee Loan Program ("KELP") and relocation loan programs. SDF ¶¶ 59, 61. But Tyco officers, directors and agents were aware of the details of Mr. Kozlowski's KELP and relocation borrowings and participated in facilitating those borrowings:

- Barbara Miller, Tyco's Treasurer from 1995 to 1998, approved wire transfers under the KELP and relocation programs and prepared materials for the Compensation Committee of Tyco's Board of Directors showing the loan balances that Mr. Kozlowski and Mr. Swartz owed as part of the KELP. Ms. Miller had detailed knowledge about the loans and wire transfers made under the relocation and KELP programs, including that Mr. Kozlowski charged advances to KELP loans for renovations on personal properties. Ms. Miller also participated in the alleged transactions by personally receiving a wire transfer for the purchase of a vacation property in Montana. SDF ¶ 63.

- Michael Robinson, who succeeded Ms. Miller as Tyco's Senior Vice President and Treasurer, regularly approved wire transfer requests charged to Mr. Kozlowski's KELP and relocation loan accounts. SDF ¶ 64.

- The amount of Mr. Kozlowski's outstanding KELP indebtedness was disclosed each year in Tyco's proxy statements, which were reviewed by Tyco Board members. SDF ¶ 69.

- In early 2002, when the Compensation Committee requested a list of all outstanding relocation and KELP loans, such information, which showed Mr. Kozlowski's outstanding KELP balance, was provided to and reviewed by the Board. SDF ¶ 70. Upon receiving this information, the Board did not request to see the wire transfers or promissory notes associated with Mr. Kozlowski's balance or take any other action. Id.

- Kathleen McRae, who worked in Tyco's Executive Treasury department, regularly made, and at times approved, wire transfer requests charged to Mr. Kozlowski's KELP and relocation loan accounts to make payments for purchases and investments of a personal nature. SDF ¶ 62. Ms. McRae also prepared and maintained worksheets identifying Mr. Kozlowski's KELP and relocation loans and their purposes. Id.

- Donna Sharpless, who worked as Director of Compensation in Tyco's Human Resources Department, regularly prepared executive compensation information for inclusion in Tyco's proxy statements. In connection with her work on the proxy statements, Ms. Sharpless received worksheets prepared by Kathleen McRae identifying all of Messrs. Swartz and Kozlowski's KELP and relocation loans and their purposes. SDF ¶ 68.

Mr. Kozlowski's eighth business record conviction was based on a relocation loan document that was purportedly false insofar as it did not match all provisions of the loan program as it had been approved by the Board. SDF ¶ 56. Tyco lawyers and officers drafted the purportedly false document and knew that it was not identical to the program adopted by the Board. SDF ¶¶ 58(a)-(d). For example:

- Barbara Miller, Tyco's Treasurer, participated in preparing the slides that were presented to the Board's Compensation Committee concerning the relocation program, and she was later involved in drafting the more detailed program document that purportedly differed from the program approved by the Compensation Committee. SDF ¶ 58(a).

- Brian Moroze, a Tyco in-house attorney, participated in creating the relocation program reflected in the slides that were presented to the Board's Compensation Committee, and was later involved in reviewing and commenting on the program document that purportedly differed from the program approved by the Compensation Committee. The purportedly false version of the document was filed by Mr. Moroze in the Legal Department. SDF ¶¶ 58(b)-(c).

- Mr. Moroze and Tyco's Legal Department were involved with preparing loan documents and organizing closings for employees who participated in the relocation program and maintained a schedule of the real properties purchased with program funds. SDF ¶ 58(d).

Tyco employees (other than Mr. Kozlowski) also had knowledge of the alleged misconduct that was the subject of Mr. Kozlowski's larceny convictions:

- Tyco employees were aware of the Walsh payment. Tyco Treasurer, Michael Robinson, Mark Swartz's assistant, Jennifer Scala, and staff person, Lisa Kane, were involved in processing the payment to Frank Walsh and his designated charity. SDF ¶ 51. Mark Foley, Tyco's former Director of Financial Operations and Senior Vice President of Finance, learned that a payment had been made to Mr. Walsh in connection with the CIT transaction in the Summer or Fall of 2001 because he was involved in determining how to account for the payment. SDF ¶ 52. Foley discussed the payment with Tyco's outside accountants, PricewaterhouseCoopers. Id.

- Patricia Prue was aware of various bonuses and loan forgiveness granted to executives, including the ADT and TyCom IPO bonuses. SDF ¶¶ 25, 35.

- Tyco employees were aware of the TyCom IPO, ADT and FLAG bonuses. Tyco's management representation letters sent to PricewaterhouseCoopers for the 2000 and 2001 years, which were signed by Mark Foley and Jeffrey Mattfolk, Senior Vice President of Business Development, among others, referenced the fact that TyCom IPO, ADT and FLAG Telecom bonuses were paid to management and key employees. SDF ¶¶ 25-26, 35-36, 45-46.

- The Audit Committee of the Board of Directors knew of the management bonuses for the TyCom IPO, sale of ADT and FLAG Telecom transactions. SDF ¶¶ 25, 45.

- Mark Foley knew that Mr. Kozlowski took a loan from Tyco to purchase artwork. Mr. Foley approved a wire transfer for the purchase of art and applied the loan for the purchase to the KELP. SDF ¶ 67.

In light of this voluminous record suggesting detailed knowledge of the conduct Tyco now claims was concealed, the Company cannot establish reliance as a matter of undisputed fact and is not entitled to summary judgment on its fraud claims.

Knowledge and participation by a company's employees and officers is imputed to the company and precludes reliance as a matter of law, with one limited exception not available here. If its "employees' actions exhibited a 'total abandonment' of [the company's] interests," the company may be able to demonstrate reliance. Bank of China, 359 F.3d at 179; see also Compudyne Corp. v. Shane, 453 F. Supp. 2d 807, 831 (S.D.N.Y. 2006). Second Circuit law is clear that whether employees "totally abandoned" the company's interests is a fact issue that cannot be decided at the summary judgment stage. Bank of China, 359 F.3d at 179.

Tyco does not even address this array of Company officers, employees and agents who were aware of these loans, much less make any effort to establish as a matter of law that they all "totally abandoned" the Company's interests. Moreover, there are many facts in the record that would support a finding that the Tyco employees at issue did not "totally abandon" the Company's interest. Tyco continued to employ some of these individuals and permitted many to retain their allegedly improper bonuses. SDF ¶¶ 123-24. For example, Brian Moroze, who participated in drafting the allegedly fraudulent relocation loan document, continued to serve as Tyco's Deputy General Counsel for corporate law at least through April 2007. SDF ¶ 124.

Tyco also cannot establish reliance because the "true" information revealing the purported inaccuracies in Mr. Kozlowski's alleged false statements was recorded in Tyco's books and records and available for review by Tyco's Board or other officers at any time. SDF ¶¶ 58(c)-(d), 72-73. A sophisticated entity like Tyco, that has the opportunity to obtain knowledge of the subject of any alleged misrepresentations, is precluded as a matter of law from claiming reliance on such misrepresentations. See Greenberg v. Chrust, 282 F. Supp. 2d 112, 118-19 (S.D.N.Y. 2003); Manley v. Ambase Corp., 126 F. Supp. 2d 743, 758-59 (S.D.N.Y.

2001); Siemens Solar Indus. v. Atlantic Richfield Co., 251 A.D.2d 82, (N.Y. App. Div. 1st Dep't 1998). This is true even in cases where the alleged misrepresentations are attributed to an insider. See Beltrone v. General Schuyler & Co., 223 A.D.2d 938, 941 (N.Y. App. Div. 3d Dep't 1996) (dismissing complaint for failure to sufficiently plead reliance where general partner did not claim that the "facts allegedly misrepresented were peculiarly within [his co-general partner's] knowledge or that [he] had no reasonable means available to him to know the truth").

C. Tyco Is Not Entitled To Summary Judgment On Its Fiduciary-Based Claims.

As listed in Section I.B., supra, Tyco seeks summary judgment on seven claims pleaded in its Complaint (as well as the unpleaded "faithless servant" claim) that all arise from the fiduciary relationship between Tyco and Mr. Kozlowski. Tyco is not entitled to summary judgment on these claims for the reasons detailed in the sub-sections below.

1. The Breach of Fiduciary Duty Claims Are Limited To The Damages Already Repaid.

While collateral estoppel may preclude Mr. Kozlowski from disputing in this action that he is liable for certain specific breaches of his fiduciary duty, Tyco cannot establish that those breaches, or breaches by Mr. Swartz, directly caused any damages in addition to the restitution it already received. See Daly v. Kochanowicz, 67 A.D.3d 78, 95-97 (N.Y. App. Div. 2d Dep't 2009); Northbay Constr. Co., Inc. v. Banco Constr. Corp., 38 A.D.3d 737, 738 (N.Y. App. Div. 2d Dep't 2007) (for a breach of fiduciary duty claim, "plaintiff must establish that the alleged misrepresentations or other misconduct were the direct and proximate cause of the losses claimed") (internal quotation marks and citation omitted); Laub v. Faessel, 297 A.D.2d 28, 30-31 (N.Y. App. Div. 1st Dep't 2002) (same). Tyco has already obtained through the criminal proceedings full restitution from Messrs. Kozlowski, Swartz and Walsh for the acts Mr. Kozlowski is collaterally estopped from disputing. SDF ¶¶ 84-86. Although Tyco seeks additional consequential damages on theories of breach, inducement to breach and conspiracy to breach, it cannot establish its entitlement to those damages as a matter of law. Indeed, Tyco's own submissions in the MDL proceedings vigorously argued that Mr. Kozlowski's conduct did ***not*** cause the consequential damages it now seeks to recover from him. SDF ¶¶ 107-14.

In addition, if New York law did apply, the conspiracy to breach fiduciary duty claim would fail for the independent reason that it is not recognized by New York law. See Am. Baptist Churches of Metro. New York v. Galloway, 271 A.D.2d 92, 101 (N.Y. App. Div. 1st Dep't 2000).

2. Tyco's Accounting Claim Should Be Dismissed As Moot.

In Claim VI, Tyco seeks an accounting of "the funds [Mr. Kozlowski] received during the course of his employment, including an accounting for the interest on the funds [and benefits] he obtained . . . as a result of his wrongful use of Tyco's funds." Tyco Br. at 17. The claim, being based on fiduciary duties owed to the corporation, is governed by the law of Bermuda pursuant to the internal affairs doctrine. See Section I.B supra. Under Bermuda law, a party may obtain an accounting from a fiduciary only for "any unauthorized profits made by him." See Selden Opp. Decl., Ex. 1, Froomkin April 8, 2010 Decl. at ¶ 3(iii). Bermuda law thus provides far more limited relief than Tyco seeks.

Tyco has already obtained from Mr. Kozlowski all the information that Bermuda law would allow, and more. Mr. Kozlowski's assets have been subject to court restraint since September 2002. Selden Opp. Decl. ¶¶ 1-4; SDF ¶¶ 92, 95-97. Mr. Kozlowski was ordered by the District Court in the MDL proceedings to provide Tyco with a full schedule of his assets and liabilities, to update that schedule every six months, to seek court approval before disposing of any large assets, and to limit his expenditures except for certain narrowly prescribed purposes. Selden Opp. Decl. ¶ 4; SDF ¶ 97. In addition, Tyco has taken extensive discovery of Mr. Kozlowski during the eight years that this action has been pending, including a deposition and more than 160 interrogatories and requests for admissions. SDF ¶¶ 93-94. Accordingly, the relief available to Tyco under the governing law of Bermuda has already been obtained, and Tyco's request for an accounting is therefore moot. The same would be true even if New York law applied. See IMG Fragrance Brands, LLC v. Houbigant, Inc., No. 09 Civ. 3655 (LAP), 2009 WL 5171741, at *11 (S.D.N.Y. Dec. 18, 2009) (dismissing accounting claim where party "has the tools of discovery to determine the value of [the other party's] assets"); Addax BV Geneva Branch v. Eastern of New Jersey, Inc., No. 05 Civ. 9139, 2007 WL 1321027, at *2 (S.D.N.Y. May 4, 2007) (same).

If New York law applied to Tyco's accounting claim, the claim should be dismissed for an additional reason. Under New York law, a party seeking an accounting must show, among other things, that the plaintiff "entrusted" to the defendant money or property imposing on him a burden of accounting. IMG Fragrance Brands, 2009 WL 5171741, at *11. Tyco cannot show that the funds as to which it seeks an accounting were "entrusted" to Mr. Kozlowski because Tyco's contention in this case is the exact opposite – that the funds were "stolen" by Mr. Kozlowski.

3. Tyco's Contribution Claim is Barred.

In Claim XII, Tyco seeks contribution from Mr. Kozlowski in connection with various civil actions filed against Tyco, most of which have now been settled by Tyco. See Tyco Br. at 27-28.

Contribution is barred for each of the federal securities actions that Tyco has settled by the Private Securities Litigation Reform Act of 1995 ("PSLRA") and orders entered pursuant thereto. The PSLRA requires courts, upon entry of a settlement, to enter an order "bar[ring] all future claims for contribution arising out of the action . . . by the settling covered person against any person, other than a person whose liability has been extinguished by the settlement of the settling covered person." See 15 U.S.C. § 78u-4(f)(7)(A)(ii). For each federal securities action settled by Tyco, a PSLRA "bar order" was entered barring Tyco from asserting any claim against Mr. Kozlowski for contribution in connection with the action. SDF ¶¶ 101-02.

The governing law of Bermuda, see Section I.B supra, defers to the court orders barring contribution in the securities actions. See Selden Opp. Decl., Ex. 1, Froomkin April 8, 2010 Decl. at ¶ 3(v). As to the other actions – the ERISA and derivative actions – Bermuda law permits contribution only for damages directly attributable to a joint tortfeasor. Id. Tyco cannot establish as a matter of law that any damages in these actions are directly attributable to Mr. Kozlowski because Tyco itself has argued, as Mr. Kozlowski's co-defendant in those cases, that neither Tyco ***nor*** Mr. Kozlowski was liable. SDF ¶¶ 100, 104-05.

Even if New York law applied to the contribution claim (as Tyco contends it does), Tyco would not be entitled to summary judgment. New York statutory law would bar contribution for all cases settled by Tyco. See N.Y. Gen. Oblig. Law § 15-108(c) ("A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person."). Moreover, New York law permits contribution only toward a judgment, not toward defense costs. N.Y. C.P.L.R. § 1402 (limiting the amount of contribution which can be recovered by a party to solely "the excess paid by [the party] over and above his equitable share of the judgment recovered by the injured party").

4. The Constructive Trust Claim Fails Because Tyco Admits It Has An Adequate Legal Remedy.

Tyco's claim for a constructive trust fails as a matter of law because Tyco has admitted that it has an adequate legal remedy. Tyco Br. at 6, 18, 19, 21 (claiming and demanding damages); see In re First Fin. Corp., 377 F.3d 209, 215 (2d Cir. 2004) ("As an equitable remedy, a constructive trust should not be imposed unless it is demonstrated that a legal remedy is inadequate.") (internal quotation marks and citation omitted, alteration in original); Pons v. People's Republic of China, 666 F. Supp. 2d 406, 415 (S.D.N.Y. 2009) (same).

D. Tyco's Conversion Claim Should Be Dismissed As Moot.

Tyco contends that Mr. Kozlowski's larceny convictions establish that he converted Tyco property. See Tyco Br. at 27. Tyco, however, already has received full restitution for the amounts purportedly stolen: Mr. Kozlowski and Mr. Swartz paid back to Tyco the amounts that each was found to have "stolen" via unauthorized bonuses, and Mr. Walsh likewise paid back the $20 million fee on which a separate larceny count was based. SDF ¶¶ 84-86, 91. Accordingly, Tyco's claim should be dismissed as moot. See Elias v. Albanese, No. 00 Civ. 2219 (JSR), 2000 U.S. Dist. LEXIS 11929, at *14 (S.D.N.Y. Aug. 21, 2000) (denying conversion claim where "the fees received by [defendant] have already been returned"); Agency Assocs., Inc. v. John R.

Sauer, Inc., No. 006708/2005, 2008 WL 5046770, at *6 (N.Y. Sup. Ct. Nov. 6, 2008) (granting defendant's motion for summary judgment dismissing claim for conversion, noting "[s]ince [plaintiff] has been compensated for the exact amount of money converted and the loss of use of its funds, it no longer has sustained any damages for conversion").

To the extent Tyco's conversion claim seeks any amounts beyond the amounts Tyco has received in restitution from Messrs. Kozlowski, Swartz and Walsh, Tyco cannot rely on principles of collateral estoppel to establish its entitlement to such additional amounts. The restitution component of the criminal sentence was calculated to include all amounts that the jury "necessarily determined" has been taken. SDF ¶¶ 79, 88-89.

Putting aside the criminal convictions – which do not establish that Mr. Kozlowski "converted" any amounts beyond those paid back in restitution – Tyco does not otherwise even attempt to show the absence of a genuine fact dispute on the question of whether any such additional amounts were "converted." Nor could it.

For example, to the extent Tyco claims that Mr. Kozlowski "converted" funds paid to Tyco employees other than himself and Mr. Swartz in connection with the TyCom IPO, ADT and FLAG bonuses, the record supports a finding that he had full authority to award such bonus payments. Members of Tyco's Compensation Committee testified that Mr. Kozlowski had sole discretion to determine compensation for all employees except the top-most senior management:

- Board member Stephen Foss testified that the responsibilities of the Compensation Committee only "focused on the top five, the top seven employees of the company." They "were the ones where we set their compensation every year." SDF ¶ 21(b).
- Board Member Frank Walsh testified that it was the practice of the Compensation Committee (which he chaired for many years) not to oversee the compensation

and benefits of key managers other than the CEO and the CFO and the operating presidents. Id.

- Board Member John Fort testified that Mr. Kozlowski did not have authority to set compensation of "executive officers of the company," which he believed were the four or five individuals "the company formally gave the title of executive officer." Id.

None of the recipients of the allegedly unauthorized TyCom IPO, ADT and FLAG bonuses, other than Mr. Kozlowski and Mr. Swartz, fall among this limited set of executive officers. SDF ¶¶ 22-23, 32-33, 43-44. Consistent with the Compensation Committee's limited role and broad delegation of authority, Mr. Kozlowski had the authority to set the compensation for every other employee who received a bonus. SDF ¶ 24. As one director, John Fort, put it, Mr. Kozlowski "had the complete authority on his own to set their compensation," and "could set their compensation [at] whatever level he wanted." SDF ¶ 24. Because he had the authority to do so, Mr. Kozlowski did not "convert" Tyco funds by awarding bonuses to employees other than himself and Mr. Swartz.

E. Tyco's Unjust Enrichment Claim Should Be Dismissed As Duplicative.

Tyco's claim for unjust enrichment relies on the same allegations as its claim for breach of fiduciary duty. Compare Tyco Br. at 26 with Tyco Br. at 15. The claim should be dismissed as duplicative. See Diversified Group, Inc. v. Daugerdas, 139 F. Supp. 2d 445, 460-61 (S.D.N.Y. 2001) (dismissing unjust enrichment claim as duplicative of breach of fiduciary duty claim and stating "[a]ny damages accruing as a result of the alleged breach may be recovered under the breach of fiduciary duty claim"); Huang, 2008 WL 553646, at *12 (same).

III. Tyco Is Not Entitled To Summary Judgment On Mr. Kozlowski's Counterclaims.

Mr. Kozlowski has asserted counterclaims to enforce his rights under several contractual severance and deferred compensation arrangements, including his Retention Agreement, his Executive Retirement Agreement ("ERA"), a Tyco-sponsored life insurance arrangement, and his accounts under Tyco's Deferred Compensation Plan ("DCP") and Supplemental Executive Retirement Plan ("SERP"). Tyco has asserted certain defenses to these counterclaims and now seeks summary judgment based on three unavailing arguments. First, Tyco contends that Mr. Kozlowski's criminal convictions establish Tyco's "fraudulent inducement" defense as a matter of law. Second, Tyco contends that the ERA, DCP and SERP are all subject to forfeiture under ERISA. Third, Tyco contends that the Retention Agreement is abrogated pursuant to the "faithless servant" doctrine. As detailed below, none of these arguments has merit. Tyco is not entitled to summary judgment on its defenses to Mr. Kozlowski's counterclaims.

A. Tyco's Fraudulent Inducement Defense Is Based On Disputed Facts And Cannot Be Established As A Matter Of Law.

Reliance is an essential element of Tyco's fraudulent inducement defense. See, e.g., Continental Airlines, Inc. v. Lelakis, 943 F. Supp. 300, 305 (S.D.N.Y. 1996) (the mere assertion of reliance is not sufficient to support a defense of fraudulent inducement, rather a party alleging fraudulent inducement "must demonstrate that in entering the agreement, he justifiably relied to his detriment upon a false representation of a material fact") (citations omitted). Tyco depends exclusively on Mr. Kozlowski's criminal convictions to support its contention that "[h]ad [Mr. Kozlowski] informed his employer of his misdeeds, he would have been dismissed, and he would not have been permitted to participate" in any of the contractual severance and deferred compensation arrangements underlying his counterclaims. Tyco Br. at 37; see id. at 31. The criminal convictions do not, however, support this contention. Reliance was not an element of any of the crimes for which Mr. Kozlowski was convicted. SDF ¶¶ 13, 54-55, 74, 80-81. The jury in the criminal case did not "necessarily decide" that Tyco justifiably relied to its detriment upon a false representation of material fact by Mr. Kozlowski in entering into any of the arrangements at issue. Nor did the jury "necessarily decide" what Tyco "would have done" at the various points in time at which each arrangement was commenced had Tyco known of the alleged misconduct which had occurred as of those points in time. Putting aside the criminal convictions – which do not establish the reliance element of Tyco's defense – Tyco does not otherwise even attempt to show the absence of a genuine fact dispute, as it is required to do to prevail on a motion for summary judgment.

As a matter of law, Tyco's fraudulent inducement defense fails for the same reason as its claim for fraud: Tyco cannot establish reliance on any alleged misrepresentation because its officers and employees' knowledge is imputed to the company. See, supra, Section II.B. Moreover, Tyco has failed to support its motion with a single fact to demonstrate what it "would have done" had it learned of Mr. Kozlowski's conduct at each of the various points in time at which each arrangement was commenced.

Tyco's ***actual*** responses to Mr. Kozlowski's alleged misconduct are more than sufficient to create a genuine question of material fact regarding what it "would have done." For example, one of Mr. Kozlowski's larceny convictions is based on the $20 million fee paid to lead director Frank Walsh. SDF ¶ 49. That payment was disclosed to the entire Tyco Board at a meeting in Boca Raton on January 16, 2002 – six months before Mr. Kozlowski's employment was terminated. Id. ¶ 115. When the payment was disclosed, not a single director demanded Mr. Kozlowski's resignation or accused him of engaging in a crime. Id. Quite the contrary – within hours of the disclosure, the Board members gathered at Mr. Kozlowski's house for a dinner party. Id. ¶ 116. As director James Pasman testified, the Board viewed the payment as "a mistake" not a fraud, and "did not adopt any resolution to terminate Mr. Kozlowski's employment." Id. None of the Board members asserted that Mr. Kozlowski had breached his duties to the Company, should step down as CEO, or should be stripped of all compensation, retirement benefits, and contractual rights. Id. ¶ 117.

The Walsh payment was not the only conduct to which the Board acquiesced. Lord Michael Ashcroft testified that he sold his Boca Raton house in 1997 (at the time of the merger of his company, ADT, with Tyco) for $2.5 million, believing that he was selling it to Mr. Kozlowski personally, and that Mr. Kozlowski was purchasing it with his personal funds; but he learned two years later that the purchase had been completed by Tyco, in ADT's name. SDF ¶ 119. Two other directors also knew in 1999 that the house in Boca Raton had been purchased in Tyco's name – precisely the type of conduct Tyco now asserts was wrongful – but not a single director demanded Mr. Kozlowski's resignation or sought to strip him of compensation, retirement benefits, or contractual rights, as Tyco does now. Id. Similarly, although Tyco's directors knew for years that Mr. Kozlowski made charitable donations in his personal name using Tyco funds (another category of conduct to which Tyco now asserts it objects), no one accused Mr. Kozlowski of misappropriating Tyco assets or demanded that he stop the practice and forfeit his compensation. Id. ¶ 120.

Perhaps the most striking evidence of what Tyco "would have done" had it learned of the alleged misconduct before Mr. Kozlowski's departure is its treatment of Mr. Swartz. After Mr. Kozlowski was fired, the Board permitted Mr. Swartz to continue to serve as CFO for months afterward, signing the Company's filings with the Securities and Exchange Commission and conducting Tyco's financial affairs, despite knowing about his role in the Walsh payment and the four bonuses underlying both Mr. Swartz's and Mr. Kozlowski's criminal convictions. Id. ¶ 121. Mere weeks before Mr. Swartz was criminally indicted, and at the same time that numerous Tyco directors and employees were cooperating with the District Attorney's investigation of the alleged fraud, Tyco paid Mr. Swartz $50 million of his retention benefits that are modeled closely on Mr. Kozlowski's retention benefits, albeit at lower dollar amounts. Id. ¶ 122; 56.1 Response ¶ 141.

Tyco makes no attempt to specify precisely what conduct purportedly "would have" caused Tyco not to enter the various arrangements at issue at each of the points in time on which they were commenced. Mr. Kozlowski's participation in the DCP and the SERP, for example, commenced on April 24, 1994 and January 1, 1995, respectively, which is ***before*** any alleged misconduct occurred, and years before the first transaction underlying a larceny conviction. Tyco SUF ¶¶ 148, 151. Tyco cannot contend that it was fraudulently induced to enter these arrangements based on alleged misrepresentations or omissions made ***after*** it entered into them. See, e.g., Frontier-Kemper Constructors, Inc. v. Am. Rock Salt Co., 224 F. Supp. 2d 520, 536 (W.D.N.Y. 2002) ("This is not a claim for fraudulent inducement, since defendant did not make the alleged misrepresentations until after the agreement was signed.").

B. None Of Tyco's Agreements With Mr. Kozlowski Is Subject To ERISA Forfeiture.

1. The ERA Is A Binding Contract And Is Not Subject To ERISA Forfeiture.

As detailed in Mr. Kozlowski's affirmative summary judgment motion, dated March 5, 2010, Tyco has an unequivocal obligation to pay Mr. Kozlowski under the clear and unambiguous terms of the ERA. Kozlowski Moving Br. at 18-28. In an attempt to avoid its unequivocal payment obligation, Tyco now asserts that the ERA "is an unfunded 'top hat' pension plan governed by ERISA," and thus subject to forfeiture under federal common law construing ERISA. Tyco Br. at 34-35.

Tyco's assertion that the ERA is governed by ERISA is conclusory, unsupported and incorrect. The ERA – an individual contract between a Bermuda corporation and its CEO that has an express Bermuda choice-of-law provision – is not governed by ERISA. Tyco does not even acknowledge, much less address, the legal principles that govern the threshold issue of whether the ERA falls within the purview of ERISA. See, e.g., James v. Fleet/Norstar Fin. Group Inc., 992 F.2d 463, 466 (2d Cir. 1993) (articulating principles for distinguishing an individual contract from an ERISA plan). For several reasons, the ERA is not an ERISA plan at all:

First, Tyco itself has admitted that the ERA is an individual contract, not an ERISA plan. Tyco tries to re-write history by contending that its "Special Appeals Committee" – which was formed after Mr. Kozlowski's employment was terminated for the specific purpose of considering Mr. Kozlowski's, and ostensibly others', claims for payment under deferred compensation arrangements – properly rejected his claim under the ERA "consistent with the federal common law of forfeiture under ERISA." Tyco Br. at 35. In fact, the Chair of the

23174425

Special Appeals Committee, Tyco's Vice President of Compensation, Benefits, and Labor Relations, Jane Greenman, testified expressly that the ERA is ***not*** an ERISA plan but rather is an individual contract:

> Q. What about executive retirement agreements; could the administrative committee make determinations of claims and benefits for those claims?
>
> A. I don't believe so.
>
> Q. And why not?
>
> A. Because they were not plans.
>
> Q. Because these are contracts instead of plans; is that a distinction?
>
> A. Right. The committee's jurisdiction really related to plans, not individual contracts.

SDF ¶ 128.

Second, the ERA makes no reference whatsoever to ERISA, much less states that it is an ERISA plan. SDF ¶ 129. Instead, it states expressly that it is a contract governed by Bermuda law. Kozlowski SUF ¶ 12. By contrast, Tyco's actual ERISA plans, such as the DCP or the SERP, make express reference to ERISA. Edwards Decl., Exs. 28, 29.

Third, as Ms. Greenman's testimony confirms, when Tyco's Special Appeals Committee reviewed Mr. Kozlowski's claim for benefits, they did not consider the ERA an ERISA plan and did not rely upon (or even cite) ERISA or federal common law as their basis for denying Mr. Kozlowski's claim. SDF ¶ 130.

Fourth, the ERA lacks all of the indicia of an ERISA plan recognized by Second Circuit law: (i) the ERA requires only a one-time lump sum payment, not the on-going administrative scheme required to be an "ERISA plan," (ii) the ERA requires no managerial discretion – the right to payment is automatic upon termination, and only requires "simple arithmetic," using the numbers specified in the contractual terms, and (iii) the ERA does not permit any assessment or analysis of the basis for termination – payment is required upon termination "***for any reason***." See Sheer v. Israel Disc. Bank of N.Y., 06 Civ. 4996 (PAC), 2007 U.S. Dist. Lexis 16488, at **6-7 (S.D.N.Y. Mar. 7, 2007) (holding employment agreement was not an ERISA plan because its administration did not require an ongoing administrative scheme). Just like the contract considered by the Second Circuit in James, the ERA is an individual contract, not an ERISA plan, because it "require[s] only a one-time, lump-sum payment triggered by a single event, requir[ing] no administrative scheme whatsoever to meet the employer's obligation." James, 992 F.2d at 466.

As a contract and not an ERISA plan, the ERA is not preempted by ERISA, not governed by federal common law and must be interpreted and applied according to its Bermuda choice-of-law provision. See Kozlowski Moving Br. at 22-25. Under the plain terms of the contract, Mr. Kozlowski is entitled to payment, and his motion for summary judgment – not Tyco's – should be granted.

Even if the ERA were an ERISA plan (which it is not), Tyco still would not be entitled to forfeiture. As the Second Circuit case on which Tyco places its principle reliance makes clear, only ***non-vested*** ERISA plan benefits are subject to forfeiture under federal common law; vested benefits are not subject to forfeiture. Aramony v. United Way Replacement Benefit Plan, 191 F.3d 140, 155 (2d Cir. 1999); Aramony v. United Way of Am., 28 F. Supp. 2d 147, 171 (S.D.N.Y. 1998), aff'd in part, 191 F.3d 140, 155 (2d Cir. 1999) (precluding forfeiture of vested benefits). Tyco concedes as much. See Tyco Br. at 36 (arguing that forfeiture should apply to "***non-vested*** pension benefits that accrued during periods of disloyalty") (emphasis added, citation omitted). Under the express terms of the ERA, Mr. Kozlowski's benefits had vested: Section 4.1 of the contract states that Mr. Kozlowski "***is fully vested*** in his executive retirement benefit at all times." Kozlowski SUF ¶ 11 (emphasis added).

Tyco's observation that ERISA's vesting provisions do not apply to "top hat" ERISA plans, see Tyco Br. at 35-36, is a red herring (even if the ERA were a "top hat" ERISA plan). The ERISA provision on which Tyco relies, 29 U.S.C. § 1051(2), provides an exception to ERISA's general vesting requirements such that an employer is not ***required*** to include vesting provisions in a "top hat" plan – but it does not ***prohibit*** an employer from including vesting provisions voluntarily. See, e.g., Bigda v. Fischbach Corp., 898 F. Supp. 1004, 1015-16 (S.D.N.Y. 1995), aff'd, 101 F.3d 108 (2d Cir. 1996). Here, the ERA provides expressly that Mr. Kozlowski's benefits are fully vested. Kozlowski SUF ¶ 11. Having voluntarily agreed to provide Mr. Kozlowski with these vested benefits, Tyco cannot invoke forfeiture to reclaim them, under ERISA or any other theory.

The ERA contains the type of absolute assurance of payment that precludes forfeiture even if ERISA common law applied (which it does not). For example, in Aramony, the court held that a disloyal CEO's benefits under one plan were subject to ERISA forfeiture, while his benefits under a different plan were not. The difference was that the latter plan contained an absolute assurance of payment, while the former plan did not. Aramony, 28 F. Supp. 2d at 17, aff'd in part, 191 F.3d at 155; accord Fields v. Thompson Printing Co., Inc., 363 F.3d 259, 263, 269-272 (3d Cir. 2004) (holding that forfeiture of the CEO's benefits was not permissible because forfeiture was contrary to the express terms of the plan providing that "In the event [Company] shall terminate the employment of [employee], all of the benefits as contained herein shall continue in accordance with the terms and provisions of this Agreement.”). The ERA contains the same type of express assurance of payment that was found to preclude forfeiture in the Aramony and Fields cases. Specifically, the ERA provides that payment is required upon termination of Mr. Kozlowski’s employment “for any reason.” Kozlowski SUF ¶ 11.

2. Mr. Kozlowski’s DCP and SERP Accounts Are Not Subject To ERISA Forfeiture.

Unlike the ERA, the DCP and SERP are ERISA plans. However, for all the reasons described above with respect to Mr. Kozlowski’s ERA benefits, ERISA does not require forfeiture of his DCP and SERP benefits. Tyco’s forfeiture defense to payment under the DCP and SERP is exactly the same as its defense to payment under the ERA, and fails under the same analysis. The only difference is that ERISA ***does*** apply to the DCP and SERP, where it has no relevance at all to the ERA.

Mr. Kozlowski’s DCP and SERP benefits were fully vested at the time his employment with Tyco was terminated:

- The SERP provides that “[a] Participant shall become ***fully vested*** in the full value of the amount credited to his or her Account upon attainment of age 55, death, disability, or completion of at least five Years of Service or a Change in Control.” SDF ¶ 137 (emphasis added). (Tyco cannot dispute that Mr. Kozlowski was 55 prior to his departure and had served more than five years.) Ms. Greenman admitted in her deposition that Mr. Kozlowski was fully vested in his SERP benefit. SDF ¶ 139.

- The DCP provides that “***Participants are fully vested***” in their contributions at the time of contribution. SDF ¶¶ 142-43 (emphasis added).

As described in the preceding Section, Tyco’s argument that ERISA “top hat” plans are exempt from vesting requirements is a red herring. ERISA does not prohibit a “top hat” plan from including vesting provisions; and where, as in the case of the DCP and the SERP, they do contain such provisions, forfeiture is not available. See, supra, Section III.B.1. In addition, like the ERA and the non-forfeitable plans in the Aramony and Fields cases, the DCP contains the type of absolute assurance of payment that courts recognize as precluding forfeiture. It provides that if Mr. Kozlowski's employment is terminated for "any reason other than Retirement, Disability, death or an authorized leave of absence," he "shall receive a Termination Benefit which shall be equal to [his] Account Balance." SDF ¶ 143.

C. Tyco Is Not Entitled To Summary Judgment On Its Defenses To Its Payment Obligations Under the Retention Agreement.

Mr. Kozlowski has asserted counterclaims under a severance agreement entered into with Tyco called the "Retention Agreement." Tyco argues that the "faithless servant" doctrine is a complete defense to its payment obligations under the Retention Agreement. See Tyco Br. at 29-31. Tyco is not entitled to summary judgment on this defense, however, because it waived any such defense under the express terms of the contract and because the "faithless servant" doctrine does not, in any event, support abrogation of a severance contract like the Retention Agreement.

In support of its argument that the New York "faithless servant" doctrine is available as a defense, Tyco cites to Paragraph 17 of the Retention Agreement, which provides that the contract is governed by New York law. See Tyco Br. at 29. Tyco contends that Mr. Kozlowski was "faithless in the performance of his services" and, under New York law, cannot recover salary or compensation for the period following his first faithless act. Id. But Tyco cannot selectively enforce terms of the contract; if the choice-of-law provision in Paragraph 17 applies, so too does the immediately preceding paragraph waiving all defenses to payment. Paragraph 16 of the Retention Agreement bars Tyco's defense:

> The Company's obligation to make any payments provided for in this Agreement and otherwise to perform its obligations hereunder shall not be affected by any set-off, counterclaim, recoupment, defense or other claim, right or action which the Company may have against Executive or others.

Edwards Decl., Ex. 24 ¶ 16. Tyco's defense based on "faithlessness" or "disloyalty," see Tyco Br. at 29-31, is precisely the type of "counterclaim, recoupment, defense or . . . right" that Paragraph 16 expressly waives. See Fed. Deposit Ins. Corp. v. Frank L. Marino Corp., 74 A.D.2d 620, 620-21 (N.Y. App. Div. 2nd Dep't 1980) (noting contractual waivers of counterclaims or setoffs are valid and enforceable in New York).

Even if the "faithless servant" argument were not waived, moreover, the doctrine on its own terms would not support Tyco's defense. As a threshold matter, the "faithless servant" doctrine has been used exclusively to reclaim ***compensation*** – typically in the form of commissions or salary – earned during a period of pervasive disloyalty. See, e.g., Battle Fowler v. Brignoli, 765 F. Supp. 1202, 1205 (S.D.N.Y. 1991); Phansalkar, 344 F.3d at 200; In re Blumenthal, 32 A.D.3d 767, 768 (N.Y. App. Div. 1st Dep't 2006). The severance owed to Mr. Kozlowski under Paragraph 5 of the Retention Agreement is, on its face, ***not compensation*** earned during the period of disloyalty and therefore not subject to forfeiture under the common law doctrine. Rather, Paragraph 5 gives rise to ***severance*** obligations that accrue only after termination of employment. SDF ¶ 148.

Moreover, the Retention Agreement contains express provisions defining the circumstances under which Tyco would be relieved of its payment obligations, and it is undisputed that those circumstances were not present in this case. Specifically:

- With respect to severance payments under Paragraph 5, Tyco would have been relieved of its obligation to pay only if Mr. Kozlowski was terminated "for

Cause" as defined in Paragraph 5(e). SDF ¶ 148. It is undisputed that the "Cause" definition – which requires, among other things, a felony conviction ***prior*** to termination of employment – was not met. SDF ¶¶ 146-47.

- With respect to "Accrued Benefits" – defined to include "any earned but unpaid base salary, incentive compensation earned but not yet paid, unpaid expense reimbursements, accrued but unused vacation and any vested benefits that Executive may have under any employee benefit plan of the Company, including without limitation, executive compensation, insurance and retirement plans or arrangements," SDF ¶ 148, – Paragraph 5 of the Retention Agreement provides that Tyco is obligated to pay regardless of the circumstances of the termination of Mr. Kozlowski's employment. SDF ¶ 149.

No case cited by Tyco supports abrogating the express terms of a written contract, much less a contract in which the parties defined precisely the circumstances under which payment obligations would or would not arise. Tyco's attempt to use the "faithless servant" doctrine essentially to re-write the express terms of a written contract is entirely unprecedented.

Tyco's related theory – that Mr. Kozlowski's convictions constituted a "material breach" of the Retention Agreement, see Tyco Br. at 33-34 – is similarly unprecedented. No case cited by Tyco supports the proposition that a court may disregard the express terms of a contract and relieve an employer of its payment obligation under those express terms on the theory that an employee's misconduct constitutes "material breach." The only case cited by Tyco in an attempt to support this unprecedented theory is inapposite. In Colliton v. Cravath, Swaine & Moore LLP, Judge Buchwald considered an employee's claim for breach of an alleged oral agreement and found that the employee's alleged misconduct would constitute a material breach of that agreement even if the agreement existed. No. 08 Civ 0400 (NRB), 2008 U.S. Dist. LEXIS 74388, at *11-12 (S.D.N.Y. Sept. 24, 2008). The alleged oral contract was vague and did not spell out any specific circumstances under which a payment obligation would or would not arise. The court was thus not required to – and did not – address the question of whether alleged employee misconduct allows an employer essentially to re-write the express terms of a contract specifying when a payment obligation would or would not arise.

CONCLUSION

For the reasons stated above and in his Statement of Additional Material Facts in Dispute and Response to the Statement of Undisputed Facts of Plaintiffs/Counterclaim Defendants Tyco International Ltd. and Tyco International (US) Inc., Mr. Kozlowski respectfully requests that the Court deny Tyco's motion for partial summary judgment in its entirety.

Dated: New York, New York
April 16, 2010

Respectfully submitted,
DEBEVOISE & PLIMPTON LLP

/s/ [Robert N. Shwartz]__________________

Robert N. Shwartz (rnshwartz@debevoise.com)
Jyotin Hamid (jhamid@debevoise.com)
Shannon Rose Selden (srselden@debevoise.com)
919 Third Avenue
New York, New York 10022
212-909-6000

Counsel to Defendant/Counterclaim Plaintiff
L. Dennis Kozlowski